Afandi bin Hussain v Global Advanced Broadband Solutions (M) Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-438–08 OF 2019
WAN MUHAMMAD AMIN JC
23 SEPTEMBER 2020

Companies and Corporations — Directors — Removal — Plaintiff issued resignation letter to first defendant — Whether plaintiff's resignation letter was wrongly construed and used by first defendant to remove plaintiff — Whether removal of plaintiff as director of first defendant invalid and contravened Companies Act 1965 ('CA 1965') — Whether third defendant's appointment as director of first defendant in contravention of CA 1965 and first defendant's articles of association — Whether second defendant could unilaterally enforce trust deed to transfer plaintiff's shares to second defendant — Companies Act 1965 ss 122(1), (6) & 145(2)

The plaintiff was a director of the first defendant. The first defendant was a company, and the second and third defendant was a director and shareholder of the first defendant. The third defendant later ceased to be a director and shareholder of the first defendant but was later reappointed as a director. The fourth defendant was a statutory body which was responsible for, inter alia, the registration of corporations and regulating their compliance to the Companies Act 2016. The plaintiff was employed as a technical director of the first defendant. Thereafter, the plaintiff was appointed as a director on the first defendant's board of directors together with the second defendant. The plaintiff was given 700,000 shares in the first defendant in two tranches, the first tranche being 550,000 shares and the second tranche, 150,000 shares. Parallel with the holding of 550,000 shares in the first defendant the plaintiff also executed a blank transfer of shares, Form 32A of the Companies Act 1965, in respect of the 550,000 shares. Later, a misunderstanding occurred between the plaintiff and the second defendant. A resignation letter was issued by the plaintiff to the first defendant ('the resignation letter'). Form 32A was executed to transfer the 550,000 shares from the plaintiff to the second defendant. The plaintiff did a company search and discovered, inter alia, that: (a) the first defendant was no longer the director of the first defendant; and (b) the third defendant's name was included as a director of the first defendant on the same date the plaintiff had issued the resignation letter. The plaintiff lodged an online complaint with the fourth defendant for the fourth defendant to investigate the first defendant's actions made through the second defendant's instructions. The plaintiff also reported regarding the issue of the wrongful transfer of the 550,000 shares to the second defendant without the plaintiff's

knowledge and consent. According to the first defendant, the second defendant and the plaintiff executed a trust deed ('the trust deed') stipulating that the plaintiff held the 550,000 shares as a trustee for the second defendant who was the beneficiary of the same upon the terms and conditions of the trust deed. The plaintiff in this originating summons sought for various declaratory orders to essentially declare that he was still a director of the first defendant and that the transfer of 550,000 of the plaintiff's shares in the first defendant to the second defendant by the second defendant was unlawful and invalid. Amongst others, the plaintiff sought for the removal the third defendant who was re-appointed as a director of the first defendant in place of the plaintiff and for the rectification of the register to reflect that the plaintiff was the rightful owner of 700,000 shares in the first defendant. The plaintiff alleged, inter alia, that he was wrongfully removed as a director of the first defendant and that the transfer of the 550,000 shares of the plaintiff's in the first defendant to the second defendant was invalid.

Held, dismissing the originating summons:

(1) The reasonable conclusion that could be arrived at based on the ordinary meaning given to the words, 'all current holding position' in the resignation letter was that the plaintiff had resigned as both an employee ('technical director') and director of the first defendant. If the plaintiff took the position that he only resigned as an employee and would continue to remain in the first defendant as a director of the first defendant, then his parting words appeared to point in the opposite direction giving the impression that he was leaving the first defendant altogether. Further, the plaintiff did not raise his complaint with the first defendant or second defendant directly. The plaintiff also did not send any letter to the second defendant to seek an explanation for his removal as a director nor did the plaintiff send a letter of demand to the first and second defendant when he felt that his removal was invalid. It was only about three years after his resignation letter that the plaintiff filed this originating summons. Therefore, the plaintiff had voluntarily resigned as a director of the first defendant when he issued the resignation letter and that the first defendant did not, as claimed by plaintiff, 'misappropriate' the resignation letter in removing him as a director (see paras 57, 59, 61–63 & 69).

(2) On the basis that the plaintiff had resigned by virtue of the resignation letter, then pursuant to article 68 of the first defendant's articles of association ('AOA') the second defendant could appoint another director to replace the 'casual vacancy' arising from the plaintiff's resignation. Upon reading article 68 with article 72 of the first defendant's AOA the logical conclusion was that either of the directors of the first defendant may exercise the power to appoint another director. The word, 'directors' must meant that the AOA conferred on both of them the power to do so.

There did not appear to be any requirement in the first defendant's AOA for the calling of a members/shareholders' or directors' meeting before a director could be appointed. Therefore, after the plaintiff's resignation, the second defendant, being the remaining director of the first defendant, was entitled to appoint another director. Further, there were no evidence to show that the first defendant's directorship fell below the minimum two directors at any time. That being the case, the first defendant did not contravene ss 122(1) and (6) of the Companies Act 1965 ('the CA 1965') and s 145(2) of the CA 1965 (see paras 85, 88–90 & 94).

(3) The plaintiff's consent was not required for the appointment of the third defendant as a director of the first defendant as the second defendant was empowered to appoint him pursuant to article 68 of the first defendant's AOA. A resolution was similarly not required in respect of the plaintiff's resignation. There was no such requirement in the first defendant's AOA and neither had the plaintiff pointed to one. It therefore also followed that the plaintiff's consent was not required for the appointment of the third defendant as a director of the first defendant. Therefore, the third defendant was validly appointed as a director of the first defendant (see paras 98–100).

(4) The first defendant recognised the transfer of the 550,000 shares which was done using the Form 32A. The plaintiff's reliance on article 20 of the first defendant's AOA to say that the transfer of the 550,000 shares required the plaintiff's participation as a director was wrongly placed. It was clear from the wordings of article 20 of the first defendant's AOA that the transfer of shares of the first defendant could be affected in two ways that was, 'by instrument in writing in any usual or common form or in any other form which the directors may approve'. Unless the directors of the first defendant had approved for any 'other form' for a transfer of shares to be affected then Form 32A under CA 1965 shall apply and did in this case (see paras 106 & 112–113).

[Bahasa Malaysia summary

Plaintif adalah pengarah kepada defendan pertama. Defendan pertama ialah sebuah syarikat, dan defendan kedua dan ketiga ialah pengarah dan pemegang saham defendan pertama. Defendan ketiga kemudiannya tidak lagi menjadi pengarah dan pemegang saham defendan pertama tetapi kemudiannya dilantik semula sebagai pengarah. Defendan keempat ialah badan berkanun yang bertanggungjawab, antara lain, pendaftaran perbadanan dan mengawal selia pematuhan mereka kepada Akta Syarikat 2016. Plaintif telah diambil bekerja sebagai pengarah teknikal defendan pertama. Selepas itu, plaintif telah dilantik sebagai pengarah dalam lembaga pengarah defendan pertama bersama dengan defendan kedua. Plaintif diberi 700,000 saham dalam defendan pertama dalam dua bahagian, bahagian pertama ialah 550,000 saham dan bahagian kedua, 150,000 saham. Selari dengan pegangan 550,000 saham

dalam defendan pertama, plaintif juga melaksanakan pemindahan kosong saham, Borang 32A Akta Syarikat 1965, berkenaan dengan 550,000 saham. Kemudian, salah faham berlaku antara plaintif dan defendan kedua. Surat peletakan jawatan telah dikeluarkan oleh plaintif kepada defendan pertama ('surat peletakan jawatan'). Borang 32A telah dilaksanakan untuk memindahkan 550,000 saham daripada plaintif kepada defendan kedua. Plaintif telah membuat carian syarikat dan mendapati, antara lain, bahawa: (a) defendan pertama bukan lagi pengarah defendan pertama; dan (b) nama defendan ketiga dimasukkan sebagai pengarah defendan pertama pada tarikh yang sama plaintif telah mengeluarkan surat peletakan jawatan. Plaintif membuat aduan dalam talian kepada defendan keempat untuk defendan keempat menyiasat tindakan defendan pertama yang dibuat melalui arahan defendan kedua. Plaintif juga melaporkan berhubung isu pemindahan salah 550,000 saham kepada defendan kedua tanpa pengetahuan dan persetujuan plaintif. Menurut defendan pertama, defendan kedua dan plaintif melaksanakan surat ikatan amanah ('surat ikatan amanah') yang menetapkan bahawa plaintif memegang 550,000 saham sebagai pemegang amanah untuk defendan kedua yang merupakan benefisiari yang sama mengikut terma dan syarat daripada surat ikatan amanah. Plaintif dalam saman pemula ini memohon pelbagai perintah pengisytiharan untuk pada dasarnya mengisytiharkan bahawa dia masih pengarah defendan pertama dan pemindahan 550,000 saham plaintif dalam defendan pertama kepada defendan kedua oleh defendan kedua adalah menyalahi undang-undang dan tidak sah. Antara lain, plaintif memohon penyingkiran defendan ketiga yang dilantik semula sebagai pengarah defendan pertama menggantikan plaintif dan untuk pembetulan daftar untuk menggambarkan bahawa plaintif adalah pemilik sah 700,000 saham dalam defendan pertama. Plaintif mendakwa, antara lain, bahawa dia telah disingkirkan secara salah sebagai pengarah defendan pertama dan bahawa pemindahan 550,000 saham plaintif dalam defendan pertama kepada defendan kedua adalah tidak sah.

Diputuskan, menolak saman pemula:

(1) Kesimpulan munasabah yang boleh dicapai berdasarkan makna biasa yang diberikan kepada perkataan, 'all current holding position' dalam surat peletakan jawatan adalah bahawa plaintif telah meletakkan jawatan sebagai pekerja ('pengarah teknikal') dan pengarah defendan pertama. Sekiranya plaintif mengambil pendirian bahawa dia hanya meletak jawatan sebagai pekerja dan akan terus kekal dalam defendan pertama sebagai pengarah defendan pertama, maka kata-kata perpisahannya kelihatan menunjuk ke arah yang bertentangan memberi gambaran bahawa dia meninggalkan defendan pertama sama sekali. Selanjutnya, plaintif tidak membangkitkan aduannya kepada defendan pertama atau defendan kedua secara langsung. Plaintif juga tidak menghantar sebarang surat kepada defendan kedua untuk mendapatkan penjelasan bagi

penyingkirannya sebagai pengarah dan juga plaintif tidak menghantar surat tuntutan kepada defendan pertama dan kedua apabila dia merasakan penyingkirannya tidak sah. Hanya kira-kira tiga tahun selepas surat peletakan jawatannya, plaintif memfailkan saman pemula ini. Oleh itu, plaintif telah secara sukarela meletak jawatan sebagai pengarah defendan pertama apabila dia mengeluarkan surat peletakan jawatan dan bahawa defendan pertama tidak, seperti yang didakwa oleh plaintif, 'menyalahgunakan' surat peletakan jawatan itu dalam menyingkirkannya sebagai pengarah (lihat perenggan 57, 59, 61–63 & 69).

(2) Atas dasar bahawa plaintif telah meletak jawatan berdasarkan surat peletakan jawatan, maka menurut perkara 68 artikel persatuan defendan pertama ('AOA'), defendan kedua boleh melantik pengarah lain untuk menggantikan 'kekosongan kasual' yang timbul daripada peletakan jawatan plaintif. Apabila membaca perkara 68 dengan perkara 72 AOA defendan pertama, kesimpulan logik adalah salah satu pengarah defendan pertama boleh menggunakan kuasa untuk melantik pengarah lain. Perkataan, 'pengarah' mesti bermakna bahawa AOA telah memberi kuasa kepada mereka berdua untuk berbuat demikian. Tidak terdapat sebarang keperluan dalam AOA defendan pertama untuk memanggil mesyuarat ahli/pemegang saham atau pengarah sebelum pengarah boleh dilantik. Oleh itu, selepas peletakan jawatan plaintif, defendan kedua, sebagai pengarah defendan pertama, berhak melantik pengarah lain. Selanjutnya, tiada bukti untuk menunjukkan bahawa jawatan pengarah defendan pertama jatuh di bawah minimum dua pengarah pada bila-bila masa. Oleh itu, defendan pertama tidak melanggar ss 122(1) dan (6) Akta Syarikat 1965 ('Akta') dan s 145(2) Akta (lihat perenggan 85, 88–90 & 94).

(3) Kebenaran plaintif tidak diperlukan untuk pelantikan defendan ketiga sebagai pengarah defendan pertama kerana defendan kedua diberi kuasa untuk melantiknya menurut perkara 68 AOA defendan pertama. Resolusi juga tidak diperlukan berkenaan dengan peletakan jawatan plaintif. Tiada keperluan sedemikian dalam AOA defendan pertama dan tidak juga ditunjukkan oleh plaintif. Oleh itu, ia juga berikutan bahawa persetujuan plaintif tidak diperlukan untuk pelantikan defendan ketiga sebagai pengarah defendan pertama. Oleh itu, defendan ketiga telah dilantik secara sah sebagai pengarah defendan pertama (lihat perenggan 98–100).

(4) Defendan pertama mengiktiraf pemindahan 550,000 saham yang dilakukan menggunakan Borang 32A. Kebergantungan plaintif pada perkara 20 AOA defendan pertama untuk mengatakan bahawa pemindahan 550,000 saham memerlukan penyertaan plaintif sebagai pengarah adalah salah. Jelas daripada perkataan perkara 20 AOA defendan pertama bahawa pemindahan saham defendan pertama boleh

dilakukan dalam dua cara iaitu, 'melalui cara bertulis dalam mana-mana bentuk biasa atau umum atau dalam apa-apa bentuk lain yang pengarah boleh benarkan'. Melainkan pengarah defendan pertama telah membenarkan sebarang 'bentuk lain' untuk pemindahan saham dilakukan maka Borang 32A di bawah Akta hendaklah digunakan dan dilakukan dalam kes ini (lihat perenggan 106 & 112–113).]

Cases referred to

Am lnvestment Bank Bhd v NEP Holdings (M) Bhd v [2014] 8 MLJ 271, HC (refd)
Chung Wai Meng v Perbadanan Nasional Bhd [2017] MLJU 814; [2018] MLRA 331, CA (refd)
Kassim bin Sulong & Anor v Guthrie Estates Holding Ltd & Ors [1993] 3 MLJ 303, HC (refd)
Lim Chew Yin v Dato Suhaimi Ibrahim & Ors [2011] 5 CLJ 906, HC (refd)
Lim Choon Seng v Lim Poh Kwee [2020] MLJU 1155, FC (refd)
Lim Tze Sian v Coverright Surface Malaysia Sdn Bhd [2017] 1 MLJ 418, CA (refd)
London Passenger Transport Board v Moscrop [1942] 1 All ER 97, HL (refd)
Ong Bee Yam v Osprey Sdn Bhd & Ors [1996] MLJU 444; [1997] 5 CLJ 408, HC (refd)
Rahaz Sdn Bhd v Faston Group Ltd & Ors and Other Appeals [2010] 1 MLJ 69, CA (refd)
Seow Mui Kim v Perwira Habib Bank & Ors [1987] 1 MLJ 46; [1985] 2 MLRH 215 (refd)
United Malayan Banking Corporation v Yap Peng Wai @ Yap Peng Hooi [1998] 5 MLJ 511, HC (refd)
Yeng Hing Enterprise Sdn Bhd v Liow Su Fah [1979] 2 MLJ 240, FC (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) ss 122(1), (6), 145(2), Fourth Schedule, Form 32A
Companies Act 2016 s 619(3)
Rules of Court 2012 O 5 r 4, O 41 rr 5(1), 6

Praveen a/l Paniselvam (Nor Affiza & Co) for the plaintiff.
Mahendra a/l Mahason (Enoveetha a/p Bhaskaran with him) (M Mahendra & Co) Fadilah bt Abdul Wahab for the defendant.

Wan Muhammad Amin JC:

[1] The plaintiff in this originating summons (encl 1) ('originating summons') sought for various declaratory orders to essentially declare that he is still a director of the first defendant and that the transfer of 550,000 of the plaintiff's shares in the first defendant to the second defendant by the second

A defendant is unlawful and invalid. Amongst others, the plaintiff sought for the removal the third defendant who was re-appointed as a director of the first defendant in place of the plaintiff and for the rectification of the register to reflect that the plaintiff is the rightful owner of 700,000 shares in the first defendant.

B

[2] This originating summons arose from the plaintiff's allegations, inter alia, that he was wrongfully removed as a director of the first defendant and that the transfer of the 550,000 shares of the plaintiff's in the first defendant to the second defendant was invalid.

C

A PARTIES

[3] The plaintiff was a director of the first defendant who was appointed on 13 July 2009 until 4 July 2016. The plaintiff previously held 700,000 shares in the first defendant. The plaintiff current holds 150,000 shares in the first defendant.

D

[4] The first defendant is a company incorporated on 20 October 2005 which nature of business involve the provision of engineering services, supply of telecommunication equipment and accessories and provision of telecommunication network.

E

[5] The second defendant is a director and shareholder of the first defendant from the date of its incorporation together with the third defendant. The second defendant initially held 300,000 shares in the first defendant and currently holds 849,9999 shares in the first defendant.

F

[6] The third defendant was a director and shareholder of the first defendant from the date of its incorporation together with the second defendant. The third defendant later ceased to be a director and shareholder of the first defendant but was reappointed as a director on 4 July 2016. The third defendant currently holds one share in the first defendant.

G

[7] The fourth defendant is a statutory body which is responsible for, inter alia, the registration of corporations and regulating their compliance to the Companies Act 2016.

H

B SERVICE OF THE ORIGINATING SUMMONS

I

[8] Only the first and fourth defendants in this originating summons were represented by solicitors. The second and third defendants were not represented. Therefore, from the outset on 13 July 2020 I had requested for the

plaintiff to file an affidavit of service to show that this originating summons has been properly served on the second and third defendants.

[9] The second and third defendants are material parties to this originating summons and there are reliefs sought therein which directly affect them namely the orders sought for the removal of the third defendant as a director of the first defendant and the retransfer of 550,000 shares currently held by the second defendant to the plaintiff.

[10] Following my request, the plaintiff filed an affidavit of service (encl 52) ('affidavit of service') on 4 August 2020 about three days prior to the hearing of this originating summons which was on 7 August 2020.

[11] The AR registered card intended for the second defendant which was exhibited in exh 'MM-3' in the affidavit of service was not signed. It is further stated in para 4 of the affidavit of service that the AR card was not returned by Pos Malaysia. In this regard the Court of Appeal in *Chung Wai Meng v Perbadanan Nasional Bhd* [2017] MLJU 814; [2018] MLRA 331 held at p 339:

> ... it is *not for the court* as in the case of Sivamurthy, and Yap Ke Huat *to dispense with the requirement to prove receipt* of the Writ and SOC by the person named in the AR registered post, or proof that the acknowledgement of the *AR registered posting has been returned and duly acknowledged by the intended recipient*. (Emphasis added.)

[12] Insofar as the third defendant is concerned the AR Registered Card intended for him was signed though not by the third defendant himself. This coupled with the fact that the third defendant had affirmed affidavits on behalf of the first defendant would lean in favour of the plaintiff's argument that the third defendant has been properly served with this originating summons.

[13] However, I am not satisfied that there was proper service of this originating summons on the second defendant and accordingly raised this with learned counsel for the plaintiff, Mr Praveen Paniselvam.

[14] In response thereto, learned counsel for the plaintiff brought to my attention the court's notes of proceedings ('NOP') of the first case management of the originating summons on 4 September 2019 before the learned deputy registrar taken from the court's Case Management System ('CMS'). Through this NOP learned counsel for the plaintiff sought to show that the second defendant was represented by Mr Saravanan of Messrs Saravanan Veerappan and therefore the originating summons has been properly served.

[15] It is not in dispute that Messrs Saravanan Veerappan was the previous solicitors for the first defendant and that they have been replaced by Messrs M Mahendra & Co who are the now the current solicitors for the first defendant.

[16] However, the question of whether Messrs Saravanan Veerappan acts or have acted for the second defendant is a matter of contention. When Messrs Saravanan Veerappans' applied to discharge themselves (encl 39), it was only in respect of the first defendant. Further, from NOP of the CMS on 15 June 2020, Mr Saravanan of Messrs Saravanan Veerappans had informed the court that he does not act for the second or third defendants.

[17] In addition to this there are no cause papers which includes any affidavit filed on behalf of the second defendant in this originating summons and neither was a notice of appointment of solicitors filed by Messrs Saravanan Veerappan stating that they act for the second defendant.

[18] Having given due consideration to the above, I am not convinced that the originating summons has been served on the second defendant. The second defendant has a fundamental right to be heard and to defend himself. The second defendant is a material party to this action where his conduct is being challenged by the plaintiff and reliefs sought against him.

[19] In *London Passenger Transport Board v Moscrop* [1942] 1 All ER 97 at p 104 Viscount Maugham held:

> ... The present appellants were not directly prejudiced by the declaration and it might even have been thought to be an advantage to them to subm it to the declaration, but, on the other hand, the persons really interested were not before the court ... *the courts have always recognised that persons interested are or may be indirectly prejudiced by a declaration made by the court in their absence*, and that, except in very special circumstances, all persons interest should be made parties, whether by representation orders or otherwise, before a declaration by its terms affecting their rights is made ... (Emphasis added.)

[20] Similarly, in *Lim Choon Seng v Lim Poh Kwee* [2020] MLJU 1155, the Federal Court recently made a similar pronouncement of the general rule that no orders can be made against a non-party:

> [70] ... 1. As for the second part of the question, the *general rule is that the court has no jurisdiction over any person other than those brought before it and no order can be made for or against or bind a non-party*: See *Kheng Chwee Elan v Wong Tak Thong* [1983] 2 MLJ 320 where Seah FJ delivering the judgment of the former Federal Court said:
>
> > In our judgment, the court below has no jurisdiction inherent or otherwise, over any person other than those properly brought before it, as parties or as persons treated as i f they were parties under statutory provisions (*Brydges v Brydges &*

> *Wood; Re Shephard and Coleman*), The terms 'judgment' and 'order' in the widest sense may be said to include any decision given by a court on a question or questions at issue between the *parties to a proceeding properly before the court* (see para 501 of *Halsbury's Laws of England* (4th Ed) Vol 26 at p 237). (Emphasis added.)

[21] Though both these cases are regarding a non-party to an action, nevertheless, the general rule can be applied here in that as the originating summons was not served on the second defendant he can be considered a non-party to the action since he was not properly brought before the court to respond to the plaintiff's allegations.

[22] Therefore, the failure to serve the originating summons on the second defendant is fatal to the plaintiff's case and this originating summons can be dismissed on that ground alone.

[23] Nevertheless, for completeness and giving the benefit of the doubt to the plaintiff, I proceeded to hear the originating summons on its merits.

FACTUAL BACKGROUND

Plaintiff's factual background

[24] The main factual chronology of events provided by the plaintiff which are largely not in dispute are as follows:

(a) the plaintiff was employed as a technical director of the first defendant pursuant to a letter of appointment dated 1 December 2006 ('letter of appointment');

(b) on 13 July 2009, the plaintiff was appointed as a director on the first defendant's Board of Directors together with the second defendant;

(c) based on para 6 of the plaintiff's affidavit in support (encl 2) ('plaintiff's affidavit in support'), the plaintiff was given 700,000 shares in the first defendant in two tranches, the first tranche being 550,000 shares and the second tranche, 150,000 shares;

(d) the plaintiff avers in para 7 of the plaintiff affidavit in support that parallel with the holding of 550,000 shares in the first defendant ('the 550,000 shares') the plaintiff also executed a blank transfer of shares, Form 32A of the Companies Act 1965 ('Form 32A'), in respect of the 550,000 shares;

(e) on or about June, 2016, a misunderstanding occurred between the plaintiff and the second defendant;

(f) a resignation letter dated 4 July 2016 was issued by the plaintiff to the first defendant ('resignation letter'), the relevant portion of which are reproduced below:

> Please accept this letter as my formal notice of resignation from Global Advanced Broadband Solutions (M) Sdn Bhd, effective 4th July 2016 from *all current holding position*.
>
> Thank you very much for the opportunity to be in the company. (Emphasis added.)

(g) the Form 32A was executed and dated 18 July 2016 to transfer the 550,000 shares from the plaintiff to the second defendant;

(h) a covering email with the resignation letter attached to it was sent by the plaintiff on 25 July 2016 ('plaintiff's cover email'). The contents of the plaintiff's cover email are reproduced below:

> Salam rabih
>
> Attached my resignation letter as staff Fendi

(i) on 19 October 2016, the plaintiff did a company search and discovered that:

(1) the first defendant is no longer the director of the first defendant;

(2) the third defendant's name was included as a director of the first defendant effective 4 July 2016 which is the same date the plaintiff had issued the resignation letter; and

(3) the plaintiff continues to hold 700,000 shares of the first defendant.

(j) through a *Whatsapp* communication on 25 October 2016 between the plaintiff and the first defendant's company secretary, En Saharudin bin Mohd Basar ('En Saharudin'), En Saharudin extended to the plaintiff documents pertaining to the plaintiff's resignation as a director of the first defendant.

(k) the plaintiff lodged an online complaint with the fourth defendant on 6 December 2016 for the fourth defendant to investigate the first defendant's actions made through the second defendant's instructions. The plaintiff also reported regarding the issue of the wrongful transfer of the 550,000 shares to the second defendant without the plaintiff's knowledge and consent;

(l) following two letters written by the plaintiff's solicitors, Messrs Nor Affiza & Co, ('plaintiff's solicitors' letter') dated 26 January 2017 and 31 January 2017 respectively to the first defendant's company secretary, JS Corporate Services Sdn Bhd, the first defendant's company secretary then replied by letter dated 2 February 2017 to the plaintiff's solicitors

stating that they have been instructed by the first defendant not to release any documents to the plaintiff's solicitors;

(m) by an email dated 4 April 2018 the fourth defendant informed the plaintiff's solicitors, inter alia, that their investigation regarding his complaint against the first defendant has been completed and that a 'No Further Action' ('NFA') was decided by thedeputy public prosecutor by reason that the resignation letter encompasses the plaintiffs resignation as a director of the first defendant;

(n) being dissatisfied with this decision the plaintiff's solicitors, Messrs Nor Affiza & Co ('plaintiff's solicitors' letter'), wrote a letter dated 12 August 2018 to the fourth defendant, inter alia, seeking clarification regarding the NFA status;

(o) by letter dated 4 March 2019, the fourth defendant replied to the plaintiff's solicitors' letter of 12 August 2018 where the fourth defendant maintained their stand and further, inter alia, stated as follows:

> Lain-Iain sebab. Tiada maklumat palsu yang diserahsimpan di SSM berkaitan perletakan jawatan Afandi Hussain sebagai pengarah syarikat GABSSB. Pihak tuan boleh mengambil tindakan sivil di bawah seksyen 602 AS 2016 bagi pembetulan daftar pengarah dan pemegang saham GABSSB

(p) on 23 April 2019, the plaintiff's solicitors wrote to the fourth defendant, inter alia, requesting for a Board Resolution ('resolution') which had caused the name of the plaintiff to be changed based on the first defendant records;

(q) by letter dated 7 May 2019, the fourth defendant replied to the plaintiff's solicitors' letter of 23 April 2019 declining to furnish the plaintiff with the said resolution and asked the plaintiff to make his request to the first defendant instead; and

(r) the plaintiff's solicitors then wrote a letter dated 7 May 2019 to the first defendant's company secretary, JS Corporate Services Sdn Bhd, requesting for the various board resolutions appointing the third defendant as a director and accepting the resignation of the plaintiff as a director as well as approving the transfer of the 550,000 shares to the second defendant.

First defendant's factual background

[25] The following are facts provided by the first defendant which are largely not in dispute:

(a) the second defendant and the plaintiff executed a trust deed dated 27 July 2009 ('trust deed') which essentially stipulates that the plaintiff

holds the 550,000 shares as a trustee for the second defendant who is the beneficiary of the same upon the terms and conditions of the trust deed;

(b) on 1 July 2016 the plaintiff incorporated a company called 'GABS Network Solutions Sdn Bhd' ('GABS'). Though there are no specific document exhibited to show that GABS was incorporated by the plaintiff, however, the plaintiff admits to this in para 25(ii) of his affidavit in reply (encl 8);

(c) the first defendant, through the third defendant, had lodged a police report against the plaintiff on 5 October 2016 ('police report') alleging that the plaintiff had, inter alia, wrongfully misappropriated the first defendant's funds and committed criminal breach of trust;

(d) in 2017 criminal prosecution against the plaintiff was initiated in the Kuala Lumpur Sessions Court in Case No 62K-211–09 of 2017 ('criminal proceedings'); and

(e) on 29 November 2018 the first defendant commenced a civil suit against GABS, the plaintiff and 2 others at the High Court of Malaya at Shah Alam vide Suit No BA-22NCvC-595–11 of 2018 ('Shah Alam Civil Suit'). In the Shah Alam Civil Suit, the first defendant alleged that the plaintiff had conspired with GABS and the other defendants therein to fraudulently mislead, cheat, steal and deprive the first defendant of monetary gains through contracts from the plaintiff's customers. The first defendant also claimed for infringement of trademark, goodwill and passing off against the plaintiff and the other defendants in the Shah Alam Civil Suit. The first defendant further alleged that the plaintiff had wrongfully misappropriated the first defendant's funds.

[26] It is pertinent to highlight at this juncture that the plaintiff did not mention nor exhibit the trust deed in his affidavit in support.

PLAINTIFF'S PRELIMINARY OBJECTIONS

[27] The plaintiff raised two preliminary objections against the first defendant affidavit in reply (encl 7) ('first defendant's first affidavit') and the first defendant second affidavit in reply (encl 17) ('first defendant's second Affidavit') (collectively referred to as the 'first defendant's affidavits') under O 41 r 5(1) of the Rules of Court 2012 ('ROC') and O 41 r 6 of the ROC on the following basis:

(a) the first defendant's affidavits (encl 7 and 17) contain facts and matters outside of the third defendant's personal knowledge and ought to be held as hearsay evidence, therefore deemed inadmissible; and

(b) the first defendant's affidavits contain scandalous, irrelevant and oppressive depositions,

Plaintiff's first preliminary objection

[28] Order 41 r 5(1) of the ROC provides:

> 5. Contents of affidavit (O 41 r 5)
>
> (1) Subject to Order 14, rules 2(2) and 4(2), to paragraph (2) of this rule and to any order made under Order 38, rule 3, an affidavit *may contain only such facts as the deponent is able of his own knowledge to prove*.
>
> (2) An affidavit sworn for the purpose of being used in interlocutory proceedings *may contain statements of information of belief with the sources and grounds hereof*. (Emphasis added.)

[29] The paragraphs in the first defendant's affidavit (encl 7) which the plaintiff sough for the court to expunge are as follows:

(a) para 12 — '.... saya telah *dinasihati* dan ingin menegaskan bahawa Defendan Kedua pada setiap masa material bertanggungjawab sepenuhnya terhadap operasi perniagaan dan perkhidmatan Defendan Pertama ...';

(b) para 14 — ' ... saya telah *dinasihati dan percaya bahawa* pada setiap masa material semasa Plaintif menjadi pengarah disyarikat Defendan Pertama, Defendan Kedua masih mengekalkan kawalan dan penyeliaan penuh ke atas kegiatan perniagaan Defendan Pertama ...';

(c) para 15 — '... saya telah *dinasihati dan sesungguhnya percaya* bahawa pemberian 550,000 unit saham Defendan Pertama kepada Plaintif adalah keputusan Defendan Kedua sendiri yang telah mempunyai strategi untuk mengembangkan perniagaan Defendan Pertama ...'; and

(d) para 16 — '... Saya telah *dinasihatkan dan percaya bahawa tidak wujud sebarang pra-syarat lisan berhubung dengan milikan 550,000 unit saham tersebut melainkan apa yang telah dinyatakan dan dipersetujui oleh Defendan Kedua dan Plaintiff di bawah perjanjian ikatan amanah tersebut. Syarat-syarat yang dinyatakan oleh Plaintiff di Perenggan 7(i) hingga (iv) adalah tidak benar dan direka semata-mata untuk menyokong tindakan Plaintif di sini(self serving*). (Emphasis added.)

[30] The plaintiff claimed the above paragraphs in the first defendant's affidavit offend O 41 r 5(1) of the ROC and raised the following arguments:

(a) they contain facts formulated outside the personal knowledge of the third defendant and deposed by virtue of advice by the third defendant's solicitors;

(b) in deposing the facts in the said offending paragraphs of the first defendant's first affidavit, the records and access allegedly referred to by the third third defendant had not been exhibited as evidence in the first defendant's first affidavit;

(c) it is improbable and impracticable for the third defendant's solicitors who are strangers to the first defendant to advise the third defendant about the material facts which had taken place privately at the first defendant during the absence of the third defendant; and

(d) it was also not deposed in the first defendant's first affidavit that the third defendant's solicitor had only advised the third defendant on legal questions and issues in deposing the first defendant's affidavit. Therefore, any material facts asserted by the third defendant which is based from the advice provided by the solicitors of the third defendant are hearsay.

[31] The plaintiff referred to cases such as *Kassim bin Sulong & Anor v Guthrie Estates Holding Ltd & Ors* [1993] 3 MLJ 303 and *Am lnvestment Bank Bhd v NEP Holdings (M) Bhd v* [2014] 8 MLJ 271 which essentially require the deponent of an affidavit to disclose the source of his information or the person who had advised him otherwise the averments would be hearsay. Further, that hearsay evidence is not admissible in proceedings which are not interlocutory.

[32] The first defendant responded to the plaintiff's allegations in paras 8 and 10 of the first defendant's second affidavit (encl 17) in that:

(a) the third defendant has personal knowledge of the plaintiff's actions;

(b) the source of the third defendant's (as deponent of the first defendant's affidavits) information is from records and documents kept by the first defendant to which the third defendant has access to; and

(c) the first defendant included further documents in the first defendant second affidavit.

[33] The second defendant also submitted that it was always open to the plaintiff to cross-examine the deponent of the first defendant's affidavits in the event there was disbelief and the basis for such disbelief in the truth of the contents of the affidavit filed (*Lim Tze Sian v Coverright Surface Malaysia Sdn Bhd* [2017] 1 MLJ 418).

[34] That it was held by the Court of Appeal in *Lim Tze Sian*, inter alia, as follows:

> *Affidavit evidence may contain admissible hearsay* in that *the source of the evidence must be disclosed* and the deponent must express his belief in its truth. (Emphasis added.)

[35] Based on the paragraphs of the first defendant's first affidavit referred to by the plaintiff, the plaintiff's objections are generally concerning the 550,000 shares and matters that are said to be within the second defendant's knowledge and not the third defendant's.

[36] It is not denied that the second defendant is known to the third defendant and that the third defendant was the first director and shareholder of the first defendant together with the second defendant based on the memorandum ('MOA') and articles of association ('AOA') of the first defendant. Therefore, there are matters which are within the third defendant's knowledge at least up to the time he ceased to become a director and shareholder and after he was reappointed as a director and became shareholder of the first defendant on 4 July 2020. No documents were exhibited to show when the third defendant ceased to be a director and shareholder of first Defendant save from the fourth defendant's corporate information report in exh 'AH-1' of the fourth defendant's affidavit in support (encl 6), that the third defendant was no longer a shareholder and director of the first defendant as at 13 July 2009.

[37] Having given due consideration to arguments by the plaintiff and first defendant on this preliminary objection, I have decided to confine myself to the averments of the first defendant which are actually supported by documentary evidence (*United Malayan Banking Corporation v Yap Peng Wai @ Yap Peng Hooi* [1998] 5 MLJ 511; *Ong Bee Yam v Osprey Sdn Bhd & Ors* [1996] MLJU 444; [1997] 5 CLJ 408) and, therefore, it is not necessary to expunge the paragraphs complained of by the plaintiff's in his preliminary objection. In *Seow Mui Kim v Perwira Habib Bank & Ors* [1987] 1 MLJ 46; [1985] 2 MLRH 215 it was held, inter alia, that a court can ignore the offending parts of an affidavit:

> In this case the proportion of hearsay evidence, which is irrelevant, to the relevant material is not so high that the whole of the plaintiff's affidavit (enclosure 2) should be removed from the file. Following the opinion of Lord Alverstone CJ in *Re JL Young Manufacturing Company Limited* the evidence on information and the sources of which have not been disclosed in paras 2, 5(a) and 7 of the plaintiff's affidavit *need not be looked at all*. (Emphasis added.)

Plaintiff's second preliminary objection

[38] The plaintiff's alleged that certain paragraphs in the first defendant's affidavits (encls 7 and 17) contain scandalous, irrelevant and oppressive depositions and relied on O 41 r 6 of the ROC which states as follows:

> Scandalous matter in affidavits (O 41, r 6)
>
> 6. The Court *may* order to be struck out of any affidavit any matter which is

scandalous, irrelevant or otherwise oppressive. (Emphasis added.)

[39] The alleged offending paragraphs are reproduced below:

Scandalous Depositions

(i) Paragraph 5 of the first defendant first Affidavit — '... Defendan Pertama telah pun memfailkan satu tindakan sivil di Mahkamah Tinggi Shah Alam untuk menuntut gantirugi untuk penyelewengan dan penipuan yang telah dilakukan oleh Plaintif melibatkan syarikat Defendan Pertama.'

(ii) Paragraph 6 of the first defendant first Affidavit — '... tindakan Plaintif memulakan tindakan ini melalui permohonan Saman Pemula di Mahkamah Tinggi Kuala Lumpur adalah *suatu tindakan menyeleweng dan tidak jujur* semata-mata untuk mendapatkan perintah deklarasi berkenaan kedudukan Plaintif sebagai Pengarah Defendan Pertama untuk *mengelakkan dirinya daripada menjadi saksi melibatkan penyelewengan Plaintif untuk melesapkan wang syarikat Defendan Pertama*.'

(iii) Paragraph 8 of the first defendant first Affidavit — '... hasrat sebenar Plaintif adalah *semata-mata untuk melengahkan prosiding di Mahkamah Tinggi Shah Alam serta melengahkan masa bagi kes jenayah terhadap Plaintif ...* '

(iv) Paragraph 9 Paragraph 5 of the first defendant first Affidavit — '... saya telah mengikuti prosiding kes jenayah terhadap Plaintif di mana Plaintif *pernah bertindak untuk mendapatkan penangguhan bicara jenayah tersebut pada bulan Jun 2018 atas alasan kononnya Plaintif mengalami penyakit sakit jantung ... Maka Plaintif di kini menggunakan prosiding di sini sebagai suatu taktik untuk melengahkan prosiding bicara penuh di Mahkamah Tinggi Shah Alam ...*'

(v) Paragraph 18 of the first defendant first Affidavit — '... telah *bertindak untuk mengambil alih pengendalian projek-projek Defendan Pertama untuk dirinya sendiri dengan menubuhkan syarikatnya sendiri atas nama GABS Network Solutions Sdn Bhd.* Tindakan Plaintif tersebut *adalah untuk menguntungkan dirinya sendiri tanpa mengira kepentingan Defendan Pertama ...*'

(vi) Paragraph 12 of the first defendant firstAffidavit — '*... penyelewengan dan salah laku yang telah dilakukan oleh Plaintif terhadap Defendan Pertama adalah benar dan berdasarkan kepada bukti-bukti nyata yang wujud dan yang telah saya lihat. Contohnya* Defendan Pertama telah memperolehi rekod pengeluaran wang dari akaun bank Defendan Pertama yang menunjukkan Plaintif telah melakukan pengeluaran wang sebanyak RM 120,608.16 ...'

(vii) Paragraph 13 of the first defendant's second Affidavit — '... *Malah pertuduhan jenayah terhadap Plaintif di Mahkamah Sesyen Jenayah Kuala Lumpur adalah berdasarkan kepada salah laku yang telah dilakukan oleh Plaintif terhadap wang syarikat Defendan Pertama*.'

Irrelevant Depositions

(viii) Paragraph 17 of the 1st Defendant's second Affidavit — '... *memulakan prosiding ini untuk mendapatkan pengiktirafan Mahkamah yang Mulia ini terhadap kedudukannya sebagai Pengarah Defendan Pertama selepas Defendan Pertama telah*

memulakan tindakan sivil di Mahkamah Tinggi Shah Alam menerusi Writ Saman No BA-22NCVC-595-11/2018 adalah menyeleweng dan tidak jujur ... '

(ix) Paragraph 20 of the first defendant's second Affidavit — '... Mahkamah Sesyen Jenayah yang mendengar perbicaraan kes jenayah Plaintif telah membuat keputusan bahawa pihak pendakwaan telah berjaya membuktikan kes prima facie terhadap Plaintif, oleh itu telahh mengarahkan Plaintif mengemukakan pembelaannya. *Pertuduhan terhadap Plaintif memang berasas dan disokong oleh bukti prima facie yang diterimapakai oleh Mahkamah Jenayah ...'*

Oppressive Depositions

(x) Paragraph 14 of the first defendant's second Affidavit — '... *Saya bertanggungjawab untuk menghalang Plaintif daripada melakukan atau mengambil tindakan yang boleh memprejudiskan kepentingan dan kesejahteraan syarikat Defendan Pertama.'*

(xi) Paragraph 10 of the first defendant's second Affidavit — '... Maka adalah *tidak munasabah dan tidak adil tindakan Plaintif di sini yang ingin mendapatkan pengiktirafan Mahkamah ini untuk satu deklarasi dan perintah bahawa Plaintif masih lagi menjadi pengarah di Syarikat Defendan Pertama...*'

(xii) Paragraph 18 of the first defendant's second Affidavit — '*... percubaan Plaintif kini untuk menafikan hakikat tersebut merupakan suatu tindakan selepas fakta (afterthought) yang membuang masa Mahkamah dan pihak yang terlibat ...'*

[40] The plaintiff's complaint against the above paragraphs of the first defendant's affidavits mainly pertains to the allegations made by the first defendant and the conclusions the first defendant had drawn from the Shah Alam Civil Suit, the police report and the criminal proceedings.

[41] As these matters are currently being determined in their respective forum or courts I have not taken heed of these allegations save for the existence and subject matter of the Shah Alam Civil Suit, the police report and criminal proceedings which are not disputed.

[42] Again, applying *Seow Mui Kim*, the court can ignore any part of these averments by the first defendant where they are unsupported by documentary evidence.

FIRST DEFENDANT'S PRELIMINARY OBJECTION

[43] The first defendant has also raised a preliminary objection that this action ought not be commenced by way of an originating summons.

[44] The first defendant relied on O 5 r 4 of the ROC which states:

4. Proceedings which may be begun by writ or originating summons (O 5 r 4*)*

(1) Proceedings —

(a) in which the sole or principal question at issue is or is likely to be one of the construction of any written law or of any instrument made under any written law, or of any deed, will, contract or other document, or any other question of law; or

(b) in which *there is unlikely to be any substantial dispute of fact*,

are appropriate to be begun by originating summons unless the plaintiff intends in those proceedings to apply for judgment under Order 14 or Order 81 or for any other reason considers the proceedings are more appropriate to be begun by writ. (Emphasis added.)

[45] The first defendant submitted that the main issues are regarding the dispute on the plaintiff's resignation and the 550,000 shares, therefore, this action cannot be decided by affidavit evidence.

[46] The first defendant had through a notice of application in encl 12 applied to convert this originating summons to a writ action. However, on 13 February 2020, the court dismissed encl 12 and parties were given leave to apply to cross-examine any deponent whose affidavit has been filed.

[47] There was no appeal against this decision on encl 12 which was heard on the merits, therefore, the first defendant is precluded from raising this issue again. Thus the first defendant's preliminary objection was dismissed.

MERITS OF THE ORIGINATING SUMMONS — SUBSTANTIAL ISSUES

[48] The plaintiff's substantive claim can be summarised as follows:

(a) the plaintiff did not resign as a director of the first defendant and the resignation letter was wrongly construed ('misappropriated', the word used by the plaintiff's solicitors) and used by the first defendant to remove the plaintiff;

(b) in the alternative, if the resignation letter is accepted as a valid notice of resignation as a director, the removal of the plaintiff as director of the first defendant is invalid and contravenes s 122(1) and 122(6) of the Companies Act 1965 ('the CA 1965');

(c) the third defendant's appointment as a director of the first defendant is in contravention of s 122(1) and 122(6) of the CA 1965 and article 67 of the first defendant's AOA; and

(d) the second defendant cannot unilaterally enforce the trust deed to transfer 550,000 shares to the second defendant.

The resignation letter

[49] It was argued on behalf of the plaintiff in para 33 of the plaintiff's written submissions (encl 33) that he did not resign as a director of the first defendant and only as a 'staff' for the position of a technical director and other additional positions such as office, warehouse and finance manager vide the resignation letter.

[50] Apart from his position as a technical director which is evidenced by the letter of appointment, there are no other documents exhibited to support the plaintiff's argument that he held other these positions in the first defendant.

[51] The plaintiff relied on two documents to prove that he did not resign as a director of the first defendant. The first is the resignation letter which states:

> Please accept this letter as my formal notice of resignation from Global Advanced Broadband Solutions (M) Sdn Bhd, effective *4th July 2016* from *all current holding position*. (Emphasis added.)

[52] The plaintiff argued that the resignation letter is to be read with the plaintiff's cover email sent on 25 July 2016 which states,

> Attached my resignation letter as *staff* (Emphasis added.)

[53] According to the plaintiff, his resignation is therefore only as a staff or employee for the various positions he is employed by the first defendant.

[54] As against this argument, the first defendant argued that the plaintiff did not hold any other position as an employee other than as a technical director. The other position the plaintiff held was as a director of the first defendant. Therefore, his resignation must mean he resigned as both an employee (technical director) and a director on the Board of Directors of the first defendant.

[55] As there are no documents exhibited to show that the plaintiff held any other position as an employee I have to accept that his employment in the first defendant is only as a technical director. The other position the plaintiff held is that of a director of the first defendant's Board of Directors.

[56] The fourth defendant took a similar interpretation of the resignation letter when they arrived at the NFA decision following the plaintiff's complaint to them.

[57] Therefore, the reasonable conclusion that can be arrived at based on the ordinary meaning given to the words, 'all current holding position' in the resignation letter is that the plaintiff had resigned as both an employee

(technical director) and director of the first defendant. Even if the plaintiff is said to have held various positions as an employee of the first defendant, the literal interpretation of the word, 'all' in resignation letter would include the plaintiff's position as a director.

[58] It is also important to note that the plaintiff ended his resignation letter as follows:

> Thank you very much for the *opportunity to be in the company* (Emphasis added.)

[59] The tone of the ending para of the resignation letter seems unusual for a person who believes he will still be in the first defendant. If the plaintiff takes the position that he only resigned as an employee and will continue to remain in the first defendant as a director of the first defendant, then his parting words appear to point in the opposite direction giving the impression that he is leaving the first defendant altogether. This further supports the argument that he resigned as an employee as well as a director.

[60] Further, from the chronology of facts provided by the plaintiff, the plaintiff claimed that he discovered his removal as director of the first defendant on 19 October 2016 when he did a company search. He then lodged a complaint with the fourth defendant on 6 December 2016 about two months later.

[61] Interestingly, the plaintiff did not raise his complaint with the first defendant or second defendant directly except where he had asked for supporting documents related to his removal as a director from the first defendant.

[62] Despite having solicitors representing him the plaintiff also did not send any letter to the second defendant to seek an explanation for his removal as a director nor did the plaintiff send a letter of demand to the first and second defendant when he felt that his removal was invalid.

[63] It was only about three years after his resignation letter that the plaintiff filed this originating summons.

[64] The first defendant further argued that the timing the resignation letter was issued by the plaintiff should also be taken into consideration given that the resignation letter was issued three days after the plaintiff incorporated GABS and that GABS, according to the first defendant, was used to take over the business and project undertaken by the first defendant.

[65] The company name GABS bears resemblance to the first defendant in that it is the abbreviation of the four words in the first defendant, Global Advanced Broadband Solutions (M) Sdn Bhd and the first defendant is said to be known by that abbreviation.

[66] Therefore, taking into consideration all the above matters which are summarised below:

(a) the literal and ordinary meaning of the words, 'all current holding position' in the resignation letter;

(b) the parting words of the plaintiff in the resignation letter, 'Thank you very much for the opportunity to be in the company';

(c) the plaintiff's two months delay in making his complaint to the fourth defendant;

(d) the circumstances surrounding the plaintiff resignation in particular the setting up of his company GABS, the police report, the criminal proceedings and the Shah Alam Civil Suit;

(e) the plaintiff delay of about three years in initiating this originating summons after finding out he was removed as a director and after the above events have occurred; and

(f) the fact that no demand was made against the first or the second defendant after the plaintiff discovered he was removed as a director of the first defendant,

it is difficult to conclude otherwise than that the plaintiff had on his own volition resigned as a director of the first defendant by way of the resignation letter.

[67] I would be remiss if I do address the plaintiff's argument that in the plaintiff's cover email the plaintiff used the word, 'staff'. Firstly, the plaintiff's cover email merely accompanies the resignation letter and therefore based on the normal usage of any cover email or cover letter for that matter, it is the document referred to in the plaintiff's cover email being the resignation letter that takes priority rather than the plaintiff's cover email itself. Secondly, with all due respect to the plaintiff, it can be argued that the plaintiff's use of the word, 'staff' is mere semantics. The facts and circumstances surrounding the plaintiff's resignation would lean in favour of the argument that by the word, 'staff', the plaintiff actually meant his position as a director as well as an employee of the first defendant.

[68] Finally, it was also alleged on behalf of the plaintiff in paras 46–48 of the plaintiff written submissions that by virtue of the first defendant's averments in

A para 19 of the first defendant first affidavit and para 7 of the first defendant's second affidavit, it is justified that the plaintiff's resignation letter was utilised as a tool to compel the removal of the plaintiff as a director of the first defendant. As I have already concluded that plaintiff had voluntarily resigned as both a director and employee of the first defendant the plaintiff argument B here do not hold any weight. The first defendant gave effect to the resignation letter and what it said thereafter is a matter after the fact. The removal of the plaintiff as a director is a direct consequence of his resignation. The first defendant's opinion (made through the averments of the third defendant) that it is justified for the plaintiff to be removed as a director of the first defendant C is immaterial at this point.

[69] Therefore, based on the aforesaid grounds it is reasonable to conclude that the plaintiff had voluntarily resigned as a director of the first defendant D when he issued the resignation letter and that the first defendant did not, as claimed by plaintiff, 'misappropriate' the resignation letter in removing him as a director.

Whether the removal of the plaintiff as director of the first defendant is invalid and E *contravenes s 122(1) and 122(6) of the Companies Act 1965*

[70] The plaintiff argued that even if the resignation letter is accepted as a valid notice of his resignation as a director the removal is invalid in any event.

F **[71]** The arguments advanced on the plaintiff's behalf on this issue can be summarised as follows:

(a) the first defendant's AOA read together with the relevant provisions of CA 1965 provides that the first defendant must have a minimum of two G directors; and

(b) therefore, when the plaintiff resigned the directorship of the first defendant fell to less than two directors and therefore it is invalid.

H **[72]** Section 122(1) and (6) of the CA 1965 provides:

122 *Directors*

(1) *Every company shall have at least two directors, who each has his principal or only place of residence within Malaysia.*

I (6) Notwithstanding anything contained in this Act or in the memorandum or articles of a company or in any agreement with a company, *a director of a company shall not resign or vacate his office* if, *by his resignation or vacation from office*, *the number of directors of the company is reduced below the minimum number required by subsection (1)* and any purported resignation or vacation of office in contravention of this section *shall be deemed to be invalid*. (Emphasis added.)

[73] The provisions of article 4 of the first defendant's AOA is in line with s 122(1) of the CA 1965 where it states:

> Until and unless otherwise determined as aforesaid the number of directors *shall be not less than two and not more than nine.* (Emphasis added.)

[74] The plaintiff then went on to argue that article 67 of the first defendant's AOA required an ordinary resolution to be passed at a general meeting for the first defendant to increase or reduce the number of directors in the first defendant.

[75] Article 67 of the first defendant's AOA states:

> 67. The company may, from time to time by *ordinary resolution* passed at a *general meeting*, *increase or reduce the number of directors*, and may also determine in what rotation the increased or reduced number is to go out of office. (Emphasis added.)

[76] It must be highlighted at this juncture that pursuant to *article 4* of the first defendant's MOA, the first defendant had adopted Table A of the Fourth Schedule CA 1965. Therefore, Table A of the Fourth Schedule of the CA 1965 applies to the first defendant's AOA:

> The regulations in *Table A in the Fourth Schedule* to the Act *shall apply except so far for those as specified or contained therein in these Articles.* (Emphasis added.)

[77] The plaintiff's complaint is that:

(a) the first defendant ought to have only allowed the plaintiff to resign (which the plaintiff is denying in any event) *after* the first defendant had appointed an additional director;

(b) the first defendant breached s 122(1) and (6) of the CA 1965 for *not* calling for a general meeting to reduce the number of directors; and

(c) in the event article 67 of the first defendant's AOA had been complied with the first and second defendants ought to have provided a notice of not less than 14 days to call for a general meeting to convene and address the plaintiffs alleged resignation. No such notice to call a meeting was received by the plaintiff in breach of s 145(2) of the CA 1965.

[78] Section 145(2) of the CA 1965 provides:

> 145 Calling of meetings
>
> (2) A meeting of a company or of a class of members, other than a meeting for the passing of a special resolution, shall be called by notice in writing of not less than fourteen days or such longer period as is provided in the articles.

[79] The first defendant in their written submissions had argued that CA 1965 is not applicable and it is instead CA 2016 that should be applied. However, during oral submissions before me, counsel for the first defendant, Mr Mahendra Mahason, appeared to have dropped this argument.

[80] In any event, insofar as the MOA and AOA of the first defendant are concerned the provisions of s 619(3) of the CA 2016 clearly state:

> (3) The memorandum of association and articles of association of an existing company in force and operative *at the commencement of this Act*, and the provisions of Table A under the *Fourth Schedule* of the *Companies Act 1965* if adopted as all or part of the articles of association of a company at the commencement of this Act, *shall have effect as if made or adopted under this Act*, *unless otherwise resolved by the company*. (Emphasis added.)

[81] Therefore, the Fourth Schedule of the CA 1965 shall continue to apply to the first defendant's AOA unless otherwise resolved by the first defendant.

[82] That being the case unless the first defendant's AOA has been amended or changed via resolution by the first defendant the later provisions of CA 2016 will not apply to it.

[83] Reverting back to the plaintiff's arguments above that there was non-compliance by the first defendant to article 67 of the first defendant's AOA, contravention of s 122(1) and (6) of the CA 1965 and s 145(2) of the CA 1965, learned counsel for the first defendant in his oral submissions advanced a simple reply which can be summarised as follows:

(a) the first defendant did not at any time reduce its directorship below the minimum of two directors;

(b) the resignation of the plaintiff and re-appointment of the third defendant took place simultaneously;

(c) there is no requirement under the first defendant's AOA for a resolution to be passed for the resignation and appointment of a new director; and

(d) therefore, there was no breach of s 122(1) and (6) of the CA 1965 and s 145(2) of the CA 1965.

[84] Upon closer examination of the first defendant's AOA (the Fourth Schedule of CA 1965) the following relevant applicable provisions pertaining to the appointment and resignation of a director can be found in articles 68 and 72:

> 68. The directors shall have *power at any time, and from time to time, to appoint any person to be a director*, either *to fill a casual vacancy* or as an addition to the existing

directors, but so that the total number of directors shall not at any time exceed the number fixed in accordance with these regulations. Any director so appointed shall hold office only until the next following annual general meeting, and shall then be eligible for re-election but shall not be taken into account in determining the directors who are to retire by rotation at that meeting.

72. The *office of director* shall become *vacant if the director* —

(a) ceases to be a director by virtue of the Act;

(b) becomes bankrupt or makes any arrangement or composition with his creditors generally;

(c) becomes prohibited from being a director by reason of any order made under the Act;

(d) becomes of unsound mind or a person whose person or estate is liable to be dealt with in any way under the law relating to mental disorder;

(e) *resigns his office by notice in writing to the company*;

(f) for more than six months is absent without permission of the directors from meetings of the directors held during that period;

(g) without the consent of the company in general meeting holds any other office of profit under the company except that of managing director or manager; or

(h) is directly or indirectly interested in any contract or proposed contract with the company and fails to declare the nature of his interest in manner required by the Act. (Emphasis added.)

[85] Therefore, on the basis that the plaintiff had resigned by virtue of the resignation letter, then pursuant to article 68 of the first defendant's AOA the second defendant can appoint another director to replace the 'casual vacancy' arising from the plaintiff's resignation.

[86] I am mindful of the plurality in the second word in article 68 that is, the 'directors' shall have power to appoint. As there must be a minimum of two directors in the first defendant at all times the logical inference is that the power is given to both the directors and is exercisable by either of them.

[87] I arrive at this interpretation also based on the fact that in the event the first defendant only has two directors and one ceases to be a director due to reasons under article 72 which automatically disqualifies him from being a director then it is left to the remaining director to appoint another director. There should be no difference in this interpretation if a director in a company with two directors suddenly resigns leaving the remaining director to exercise the power to appoint a replacement director. In this regard, it must be noted that the resignation letter states that the plaintiff's resignation takes effect on,

4 July 2016, the same date as the resignation letter. It did not provide for a grace period for the resignation letter to take effect.

[88] Hence, upon reading article 68 with article 72 the logical conclusion is that either of the directors of the first defendant may exercise the power to appoint another director. The word, 'directors' must mean that the AOA confers on both of them the power to do so.

[89] Apart from article 68, there does not appear to be any requirement in the first defendant's AOA for the calling of a members/shareholders' or directors' meeting before a director can be appointed.

[90] Therefore, after the plaintiff's resignation, the second defendant, being the remaining director of the first defendant, is entitled to appoint another director and in this case the third defendant on 4 July 2016.

[91] Based on the two corporate information reports issued by the third defendant printed on 30 August 2016 and 19 October 2016 ('SSM searches') as exhibited by the plaintiff in exhs 'AH2' and 'AH4' in his affidavit in support, the removal of the plaintiff took place on 4 July 2016 and the appointment of the third defendant also took place on 4 July 2016.

[92] Apart from these SSM searches there are no evidence to show that the first defendant's directorship fell below the minimum two directors at any time.

[93] In fact these SSM searches show a simultaneous removal of the plaintiff as a director and appointment of the third defendant in his place or arguably vice versa.

[94] This being the case, I am inclined to agree with learned counsel for the first defendant's abovesaid arguments that the first defendant did not contravene s 122(1) and (6) of the CA 1965 and s 145(2) of the CA 1965 in that:

(a) the first defendant directorship did not fall below the minimum of two directors;

(b) the resignation of the plaintiff and re-appointment of the third defendant took place simultaneously; and

(c) there is no requirement under the first defendant's AOA for any resolution to be passed for the resignation and appointment of a new director.

[95] When I raised this issue regarding the simultaneous removal of the first defendant and appointment of the third defendant with the fourth defendant, learned counsel for the fourth defendant, Cik Fadilah Abdul Wahab, agreed that there was no impropriety in doing so and that it is not uncommon in practice. The act is like 'swopping' directors.

Whether the third defendant's appointment as a director of the first defendant is in contravention of s 122(1) and 122(6) CA 1965 and article 67 of the first defendant's AOA

[96] This issue is related to the previous issue under heading E2 above which has already been addressed. For the sake of completeness, the plaintiff's arguments on this issue are:

(a) no notice to convene a general meeting pursuant to article 67 of the first defendant's AOA was presented to the plaintiff for the appointment of the third defendant as the director of the first defendant before the plaintiff was removed;

(b) no general meeting pursuant to article 67 of the first defendant's AOA was held to appoint the third defendant as a director of the first defendant;

(c) there was no ordinary resolution appointing the third defendant as a director of the first defendant in breach of article 67 of the first defendant's AOA; and

(d) no documentary evidence had been exhibited in both the first defendant's affidavits to prove that the plaintiff as a director and majority shareholder of the first defendant consented to the appointment of the third defendant.

[97] For article 67 of the first defendant's AOA to apply there must be an increase or reduction in the minimum number of directors of the first defendant thereby necessitating a resolution to be passed. As the first defendant neither increased nor decreased the minimum number of its directors article 67 is thus not applicable here.

[98] The plaintiff's consent is also not required for the appointment of the third defendant as a director of the first defendant as the second defendant is empowered to appoint him pursuant to article 68 of the first defendant's AOA as I have dealt with above.

[99] Contrary to the plaintiff's submission, a resolution is similarly not required in respect of the plaintiff's resignation. There is no such requirement in the first defendant's AOA and neither has the plaintiff pointed to one. It

therefore also follows that the plaintiff's consent is not required for the appointment of the third defendant as a director of the first defendant.

[100] With all due respect to learned counsel for the plaintiff, his arguments on this issue is without merit and I therefore find that the third defendant was validly appointed as a director of the first defendant on 4 July 2016.

Whether the second defendant can unilaterally enforce the trust deed to transfer the 550,000 shares to the second defendant

[101] On this issue the plaintiff argued that no person shall be recognised to hold shares under a trust for other persons and relied on article 7 of the first defendant's AOA which states:

> 7. Except as required by law, *no person shall be recognized by the company as holding any share upon any trust*, and the *company* shall not be bound by or be compelled in any way to recognize (even when having notice thereof) any equitable, contingent, future, or partial interest in any share or unit of a share or (except only as by these regulations or by law otherwise provided) any other rights in respect of any share *except an absolute right to the entirely* thereof in the *registered holder*. (Emphasis added.)

[102] The plaintiff submitted that the second defendant's rights as the beneficiary of the trust deed is in personam between the second defendant and the plaintiff and cannot be recognised by the first defendant.

[103] As against this argument, the first defendant argued that the second defendant affected the transfer the 550,000 shares by executing the Form 32A based on cl 9 of the trust deed which states:

> *9. Transfer of the Said Shares*
>
> 9.1 *The Trustee shall be desirous of retiring*
>
> 9.2 a bankruptcy petition shall be presented against the Trustee
>
> 9.3 the trustee shall be unable to pay its debts
>
> 9.4 *the Trustee shall no longer be able to act in accordance with the instructions of the Beneficiary*
>
> then and in such case, the Trustee shall immediately inform the Beneficiary in writing and shall do execute and perform all acts and things necessary and expedient to transfer the Said Shares to either the Beneficiary or any nominee or nominees of the Beneficiary.'then and in such case, the Trustee shall immediately inform the Beneficiary in writing and shall do execute and perform all acts and things necessary and expedient to transfer the Said Shares to either the Beneficiary or any nominee or nominees of the Beneficiary. (Emphasis added.)

[104] These are in fact matters which the second defendant should respond to as they would be within his knowledge. This is one of the reasons I had from the beginning highlighted to learned counsel for the plaintiff the importance of ensuring that the originating summons is served on the second defendant. In this situation the first defendant's role was to merely give effect to the Form 32A by transferring the 550,000 shares to the second defendant. It was rightfully an issue between the two shareholders.

[105] The plaintiff had referred to the case of *Lim Chew Yin v Dato Suhaimi Ibrahim & Ors* [2011] 5 CLJ 906 where it was held by the High Court:

> [13] Having found a relationship of trust existing between the first defendant as a trustee and the plaintiff as a cestuis que trust, counsel for *the plaintiff urges the court to exercise its power in its equitable jurisdiction to grant an order in terms of prayer (c) & (d) of the plaintiffs statement of claim*. However this would have the effect in law of *causing the second defendant to recognise the relationship of trust that existed between the first defendant as the Registered Shareholder of the fourth defendant and the plaintiff as the beneficial owner of the shares*. Abdoolcader J (as he then was) in the *Federal Court case of Yeng Hing Enterprise Sdn Bhd v Liow Su Fah* [1979] 2 MLJ at p 240 NB p 242; [1979] 1 LNS 130 citing a useful passage from the judgment of *Coleridge CJ in Re Perkins ex-parte Mexican Santa Barbara Mining Co* and I quote:
>
> > In the first place, it seems to me extremely important not to throw any doubt on the principle that *companies have nothing whatever to do with the relation between trustees and their cestuis que trust in respect of the shares of the company. If a trustee is on the company's register as the holder of shares, the relations which he may have with some other person in respect of the shares are matters with which the company have nothing whatever to do; they can look only to the man whose name is upon the register*. (Emphasis added.)

[106] In the present case herein, the transfer of the 550,000 shares to the second defendant was done by executing the Form 32A which was signed by the plaintiff. The first defendant is not asked to recognise the trust deed nor the beneficiary thereunder. That is a matter between the plaintiff and the second defendant as shareholders. The first defendant recognised the transfer of the 550,000 shares which was done using the Form 32A.

[107] Therefore, this case is different from the case of *Liew Chew Sin* and the first defendant had not in any way deviated from the principle in that case. In this regard the passage quoted from Coleridge CJ in *Re Perkins ex-parte Mexican Santa Barbara Mining Co* is clear in that a company 'can look only to the man whose name is upon the register'.

[108] Thus, after the execution of the Form 32A the first defendant recognised the second defendant as, 'the man whose name is upon the register'.

[109] In *Liew Chew Sin* the High Court was asked to give effect to the trust existing between the first defendant therein as a trustee and the plaintiff there as a *cestuis que trust*. This is not the case here where the transfer of the 550,000 shares had already been affected by way of the Form 32A.

[110] The other cases relied on by the plaintiff, the Federal Court case of *Yeng Hing Enterprise Sdn Bhd v Liow Su Fah* [1979] 2 MLJ 240 and Court of Appeal case of *Rahaz Sdn Bhd v Faston Group Ltd & Ors and Other Appeals* [2010] 1 MLJ 69, both on this same issue, are also not applicable as they concern the recognition of a company of shares held on trust. The principle that a company only recognises the name of the shareholder on its register is trite and it is not the issue here.

[111] The other issue raised by the plaintiff is that the transfer of the 550,000 shares required the plaintiff's approval pursuant to article 20 of the first defendant's AOA which states:

> 20. Subject to these regulations *any member may transfer* all or any of his shares *by instrument in writing* in any usual or common form *or* in any *other form which the directors may approve*. The instrument shall be executed by or on behalf of the transferor and the transferor shall remain the holder of the shares transferred until the transfer is registered and the name of the transferee is entered in the register of members in respect thereof. (Emphasis added.)

[112] With respect, the plaintiff's reliance on article 20 of the first defendant's AOA to say that the transfer of the 550,000 shares required the plaintiff's participation as a director is wrongly placed.

[113] It is clear from the wordings of article 20 of the first defendant's AOA that the transfer of shares of the first defendant can be affected in two ways that is, 'by instrument in writing in any usual or common form or in any other form which the directors may approve'. Form 32A is a specific instrument provided for under CA 1965 and is commonly accepted as the usual method of transfer. Unless the directors of the first defendant had approved for any 'other form' for a transfer of shares to be affected then Form 32A under CA 1965 shall apply and does in this case.

[114] Therefore, based on the above reasons, I dismissed the originating summons in encl 1 with costs of RM9,000 in respect of the first defendant and costs of RM500 in respect of the fourth defendant.

Originating summons dismissed.

Reported by Nabilah Syahida Abdullah Salleh